Filed 2/5/20 P. v. Melara CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. OSKAR ANTHONY MELARA, Defendant and Appellant.	B289019 (Los Angeles County Super. Ct. No. BA427561)

APPEAL from a judgment of the Superior Court of Los Angeles County, David V. Herriford, Judge. Affirmed.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, and Paul M. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Oskar A. Melara appeals from his second degree murder conviction. The conviction rested on the theory that defendant aided and abetted Gustavo Luna, defendant's fellow gang member, who shot and killed Christopher Hernandez, a rival gang member. This court previously affirmed Luna's conviction for first degree murder. The parties agree that the critical issue at defendant's trial was whether defendant knew Luna would shoot Hernandez.

During defendant's trial, a prosecution gang expert testified about the nature of gangs and more specifically, about conduct involving rival gang members. The gang expert also answered a lengthy hypothetical question, which tracked the evidence in the case. Most of the gang expert's testimony is unchallenged on appeal.

Defendant, however, argues that the gang expert—in the context of answering a hypothetical question about a hypothetical gang member—should not have opined as to *defendant's* knowledge of Luna's conduct, *defendant's* intent, and *defendant's* guilt. For the reasons set forth below, defendant's argument is based on a faulty premise, to wit, that the expert opined on defendant's knowledge, intent, or guilt. The record reveals that the expert merely answered a question about a hypothetical gang member. As also set forth below, under controlling authority from our Supreme Court, asking such a hypothetical was not error.

On appeal, defendant also argues that the trial court erred in denying his motion for a new trial based on alleged jury misconduct. Defendant, however, has failed to demonstrate error because he identifies no admissible evidence supporting his theory of jury misconduct. Defendant's related argument that his

trial counsel was ineffective in failing to identify a juror's alleged concealment of information during voir dire is unsupported by the record. There was no evidence of concealment and therefore no evidence that counsel was ineffective.

Defendant's remaining challenges are to his sentence. He argues that his trial counsel rendered ineffective assistance by failing to provide the trial court with a "mitigation report" before the court pronounced its sentence. Even if defense counsel did not timely provide the report, defense counsel summarized the main factors in mitigation both in her sentencing memorandum and at the sentencing hearing. Any failure to provide the more detailed report thus did not prejudice defendant.

Defendant argues that the trial court misunderstood the extent of its discretion in imposing a Penal Code section 12022.53, subdivision (d) firearm enhancement.[1] Appellate courts disagree on whether the trial court has discretion to impose an uncharged lesser enhancement or has discretion only to impose or strike the charged enhancement. (*People v. Morrison* (2019) 34 Cal.App.5th 217 *(Morrison*) [holding that an uncharged lesser enhancement may be imposed]; *People v. Tirado* (2019) 38 Cal.App.5th 637, 642–644 (*Tirado*), review granted Nov. 13, 2019, S257658 [holding that the trial court is limited to imposing or striking the charged enhancement].) Pending guidance from our Supreme Court, we conclude *Tirado* states the better rule, under which there was no error here. (*People v. Yanez* (Jan. 21, 2020, E070556) ___ Cal.App.5th ___ [2020 D.A.R. 443].)

---

[1] Undesignated statutory citations are to the Penal Code.

Finally, under the facts of this case, defendant demonstrates no error in imposing fees, fines, and assessments without holding an ability to pay hearing. (*People v. Caceres* (2019) 39 Cal.App.5th 917 (*Caceres*).) We affirm the judgment.

PROCEDURAL BACKGROUND

The People charged defendant with the murder of Hernandez. The People further alleged that the murder was committed for the benefit of a gang within the meaning of section 186.22, subdivision (b)(4) and that a principal personally used and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e)(1). The trial court later dismissed the section 12022.53, subdivision (b) and (c) allegations on the People's motion.

The prosecutor argued that the key issue in the case was whether defendant aided and abetted Luna. Defense counsel seconded this assessment: "[T]he principal question . . . is did Oskar Melara aid and abet" Luna. Defense counsel argued that it was reasonable Melara did not know that Luna would shoot Hernandez.

Jurors convicted defendant of second degree murder and found that the crime was committed for the benefit of a gang and that a principal intentionally discharged a firearm within the meaning of section 12022.53, subdivision (d).

The trial court denied defendant's motion for a new trial based on alleged juror misconduct. The trial court sentenced defendant to 15 years to life for the second degree murder and 25 years to life for the section 12022.53, subdivision (d) enhancement. The court denied defendant's request to strike the enhancement in the interest of justice. The court ordered that defendant pay a $40 court operations assessment (§ 1465.8,

subd. (a)(1)) and a $30 criminal conviction assessment (Gov. Code, § 70373). The court also ordered that defendant pay a $300 restitution fine pursuant to section 1202.4, subdivision (b) and a separate $300 parole revocation fine, which it suspended unless parole is revoked (§ 1202.45). Finally, the court ordered that defendant pay victim restitution in the amount of $12,420.50. Defendant indicated there was "[n]o objection" to the $12,420.50 victim restitution. Defendant did not request or receive an ability to pay hearing prior to the imposition of the above-referenced restitution fine and assessments. Defendant timely appealed.

FACTUAL BACKGROUND

On June 5, 2014, Hernandez, a Rebels 13 gang member, and his parents attended his sister's middle school graduation. Just before 11:00 a.m., the family was walking to a bus stop when Luna, a La Mirada Locos gang member, shot Hernandez multiple times. Hernandez died of multiple gunshot wounds.

Shortly before the shooting, Hernandez chased defendant, who was riding a bicycle. Defendant pushed Hernandez. Defendant and Hernandez made signs symbolizing their respective gangs. Hernandez removed his shirt revealing a Rebels 13 gang tattoo. Hernandez asked defendant to fight one on one.

A few minutes before Luna shot Hernandez, defendant called Luna.[2] Evidence from cell phone records indicated that defendant called Luna twice (at 10:51 a.m. and at 10:55 a.m.);

---

[2] Defendant used his girlfriend's phone to make these calls.

the records did not reveal whether the two spoke or the content of any conversation.

Immediately before Luna shot Hernandez, Luna drove to defendant and stopped to talk to him. Luna then drove up to Hernandez, who was standing on the sidewalk. Luna shot Hernandez and drove away. Cell phone records suggest that defendant entered Luna's car shortly after the shooting because Luna's phone and the phone defendant was using traveled on the same path at the same speed to Oceanside, California.

1. Surveillance Video

Video surveillance of the crime scene showed Hernandez and his family walking near a Del Taco restaurant on Sunset Boulevard. It further showed Hernandez chasing defendant, who was riding a bicycle. Hernandez then returned to his family, and they continued walking together.

Surveillance video depicts the following sequence of events: defendant is holding a phone to his head while riding his bicycle. Shortly afterwards, a black car enters the Del Taco parking lot; defendant approaches the black car; and defendant points towards Hernandez twice. The black car pulls up to Hernandez and his family, and the driver shoots Hernandez. It appears that defendant is present when the driver shoots Hernandez. Hernandez falls backwards to the ground.

2. Gang Evidence

Officer Mark Austin testified for the prosecution. Officer Austin opined that Luna was a member of the La Mirada Locos gang. Austin believed that Luna was a "low-level member" of the La Mirada Locos gang. Austin opined that defendant was a "mid-level" member of the La Mirada Locos gang.

Officer Austin testified that a person is qualified to join a gang when that person "put[s] in work" or commits crimes "that benefit[ ] the gang." Gangs, including the La Mirada Locos gang, claim territory and are willing to fight to protect their territory. Violence is often the consequence of entering a rival gang's territory. A gang member who disrespects a rival's territory may be killed. Austin observed cases in which a gang member would "set up a killing" to protect gang territory. Austin recalled five to seven such cases. La Mirada Locos gang members use hand signs to threaten rival gang members. The location where Luna shot Hernandez is in an area claimed by the La Mirada Locos gang.

The two gangs were rivals. Photographs on Facebook showed defendant using gang signs. Defendant also wore attire commonly associated with the La Mirada Locos gang. Photos also showed defendant with other La Mirada Locos gang members. Police identified defendant as a La Mirada Locos gang member on field identification cards, and defendant admitted to officers that he had been arrested for gang-related crimes. The prior offense involved a vandalism charge.

The La Mirada Locos gang shared a border with the Rebels 13 gang. Officer Austin noted that Hernandez had a large tattoo stating "Rebels 13" on his chest. Austin testified that Hernandez had to "earn" that tattoo by committing crimes or raising money for his gang. Displaying a tattoo to a rival gang member is an example of disrespecting the rival. According to Officer Austin, a Rebels 13 gang member who enters another gang's territory is demonstrating "boldness."

The prosecutor asked Officer Austin the following hypothetical question: "A gang member in Rebels 13 and his

family are walking down a busy public street within a territory claimed by the La Mirada Locos street gang at approximately 10:45 to 10:50 in the morning. As the Rebels 13 gang member is walking, he's pushed and taunted by a La Mirada Locos gang member who is riding a bicycle and an argument starts between the Rebels 13 and La Mirada Locos gang member. The Rebels 13 gang member takes off his shirt . . . and chases the La Mirada Locos gang member who remains on his bicycle. After being chased by the Rebels 13 gang member, the La Mirada Locos gang member on the bicycle makes a phone call. A few minutes later a La Mirada Locos gang member or associate arrives and stops near the victim. The La Mirada Locos gang member is the driver and sole occupant in this vehicle. There's a brief non-verbal communication between the La Mirada Locos gang member on the bicycle towards the driver and the Rebels 13 gang member. While the Rebel[s] 13 gang member is distracted by and looking at the La Mirada Locos gang member on the bicycle, the La Mirada Locos gang member in the vehicle drives up next to the Rebel[s] 13 gang member and immediately and without warning or any interaction shoots the Rebel[s] 13 gang member several times. The La Mirada Locos gang member on the bicycle watches the shooting from a short distance away and then both the La Mirada Locos gang members together flee the area."

Officer Austin was asked how the crime benefits the La Mirada Locos gang, how it benefits the shooter, and how it benefits the gang member on the bike. With respect to the hypothetical gang member on the bike, Austin testified: "He is seen as someone that [*sic*] has had a confrontation and he's not going to back down. And he obviously did [not] have the means to carry out the violence at the time, but he took immediate

action and solved what he saw as the problem. So even though he may not be the person shooting the gun, he's still attaining that level of respect from his fellow gang members and moving up [in the gang hierarchy]. And I think that is proof, just based on this hypothetical, the fact that he didn't call someone to get in a fight with him. If that had happened, he wouldn't have ridden away and watched. He would have gotten involved in the fight. If he wanted to fight someone, he would have gotten out. The guy would have gotten out of the car and they both would have [fought the rival gang member]. Now they have two-on-one odds and have been involved in a physical altercation." The trial court overruled defense counsel's objection of "[s]peculation" made at the conclusion of the above summarized testimony.

Officer Austin continued his testimony as follows: "So my opinion, based on those facts, is that he [the hypothetical gang member on a bicycle] knew exactly what was about to happen and it happened. It was carried out. What he wanted was carried out. Now they both [the hypothetical shooter and the hypothetical bicycle rider] are rising in their own personal ranks within the gang." Defense counsel did not object to this testimony. During cross-examination, defense counsel asked whether Officer Austin assumed that the hypothetical shooter and bicycle rider had a conversation. Officer Austin eventually testified that he did make this assumption.

Martin Flores testified as a defense gang expert. He opined that defendant was not a gang member. Flores testified that he could not determine whether the hypothetical shooter and hypothetical bicycle rider acted for the benefit of the gang because "[i]t's not clear what initiated that conflict. If the conflict

was a gang conflict. Whether the conflict was personal. Was it a dispute. Which one started what."

DISCUSSION

A. Defendant Demonstrates No Error In Admission of the Gang Expert's Answer to a Hypothetical Question

Defendant argues that the prosecution's gang expert improperly testified as to defendant's knowledge, intent, and guilt. According to defendant, Officer Austin "offered his opinion and conclusions about the knowledge and intent elements of murder and the aiding and abetting theory of liability for murder, and how the issue of guilt should be decided." Defendant further contends the testimony not only concerned the ultimate issue in the case, but also lessened the prosecution's burden of proof. Neither the record nor controlling authority supports defendant's argument.

As noted above, Officer Austin testified: "So my opinion, based on those facts, is that he [the hypothetical gang member on a bicycle] knew exactly what was about to happen and it happened. It was carried out. What he wanted was carried out. Now they both [the hypothetical shooter and the hypothetical bicycle rider] are rising in their own personal ranks within the gang." Contrary to defendant's argument, Officer Austin was not asked, and offered no opinion about defendant's knowledge, intent, or guilt. Instead, the evidence defendant challenges involved the prosecutor asking Officer Austin whether a hypothetical gang member would benefit from certain hypothetical conduct. Under controlling case law, the distinction

between a hypothetical gang member and the defendant gang member is critical.

People v. Killebrew (2002) 103 Cal.App.4th 644 (*Killebrew*) provides the strongest support for defendant's position. In *Killebrew*, the gang expert testified that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id*. at p. 652.) Although the record in that case was unclear as to whether the expert was responding to a hypothetical question, the appellate court held that the expert testimony was improper because it concerned an "ultimate issue," that is, "the subjective *knowledge and intent* of each occupant in each vehicle." (*Id*. at p. 658.)

In *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), our high court recognized *Killebrew* has "limited significance" because *Killebrew* did not distinguish an expert's opinion about the knowledge of hypothetical persons from the knowledge of "specific persons." (*Vang*, at p. 1047.) *Vang* reasoned that experts are permitted to opine on ultimate issues and in doing so, do not usurp the jury's role as fact-finder. "[E]xpert testimony is permitted even if it embraces the ultimate issue to be decided. (Evid. Code, § 805.) The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Vang*, at pp. 1049–1050.)

Similarly, in *People v. Gonzalez* (2006) 38 Cal.4th 932 (*Gonzalez*), our high court concluded there was no error in admitting a gang expert's opinion on whether a gang member

would feel intimidated if he testified against a fellow gang member. Holding that *Killebrew* "*has no relevance here*," *Gonzalez* observed, "[A]nswer[ing] hypothetical questions based on other evidence the prosecution presented . . . is a proper way of presenting expert testimony." (*Id*. at p. 946, italics added.) The *Gonzalez* court further reasoned, "It is true that [the expert's] opinion, if found credible, might, together with other evidence, lead the jury to find the witnesses were being intimidated, which in turn might cause the jury to credit their original statements rather than their later repudiations of those statements. But this circumstance makes the testimony probative, not inadmissible." (*Id*. at p. 947.)

Vang added: "To the extent *Killebrew* . . . purported to condemn the use of hypothetical questions, it overlooked the critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves." (*Vang*, *supra*, 52 Cal.4th at p. 1049.) Defendant also fails to recognize this analytic distinction.

As previously noted, Officer Austin did not opine on defendant's knowledge. Instead, he responded to a hypothetical based on facts in evidence on whether a hypothetical gang member's conduct would have benefited the gang. Simply put, defendant's argument simply ignores the difference between himself and the hypothetical gang member discussed in Officer Austin's testimony.[3]

---

[3] The Attorney General argues that defendant forfeited his challenge to admission of Officer's Testimony based on *Killebrew* by failing to raise that specific objection below. Defendant counters that if we find forfeiture, then defense trial counsel was

B. Defendant Demonstrates No Error in the Denial of His Motion for New Trial Based on Alleged Jury Misconduct

After trial, defendant moved for a new trial based on alleged jury misconduct. The trial court denied his motion. Defendant argues that the trial court erred in denying his motion for new trial or setting the matter for an evidentiary hearing. We first provide additional background and then discuss defendant's argument.

1. Additional Background

After the verdict, defense counsel moved for a new trial on the ground of juror misconduct. Defendant relied on Juror No. 44's posttrial affidavit in which she averred:

- "During the deliberations process, I observed that the jurors made an assumption of guilt based on the fact that there was a gang allegation in the case."
- "Based on how the jurors spoke, I believed that many jurors already had their mind[s] made up as to guilt because of the gang element, even before deliberations began."
- "The jurors used the 'but for' phrase as a standard in determining guilt instead of applying the reasonable doubt standard."
- "One juror . . . used her personal experiences growing up with gangs during deliberations."

---

ineffective in failing to object on the basis that admitting the testimony invaded the province of the jury, as opposed to making merely a speculation objection. Given our ruling on the merits, we do not address these issues.

● "One juror . . . was a bully and was the worst. He created hostility in the jury room. He discussed his personal experiences with gangs also." The same juror "told the jury to pray together for the defendant and his family."

● "I felt pressured to vote guilty because" of "bullying" by other jurors. "I voted guilty because I just wanted to get out of there."

Relying on Evidence Code section 1150, the trial court found Juror No. 44's affidavit inadmissible and denied defendant's motion for a new trial.[4] Evidence Code section 1150 provides in pertinent part: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

" 'When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible under Evidence Code section 1150, subdivision (a).' [Citation.] 'If the evidence is admissible, the court must then consider whether the facts establish misconduct. [Citation.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial.' " (*People v.*

---

[4] With one exception, the trial court provided defense counsel the jurors' identifying information. Other than Juror No. 44, no juror spoke to defense counsel's investigator.

Engstrom (2011) 201 Cal.App.4th 174, 182.) We independently review the trial court's denial of defendant's new trial motion. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261–1262.)

2. Juror No. 44's Affidavit Was Not Admissible

Our high court has held: "[E]vidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict. The jury's impartiality may be challenged by evidence of 'statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly,' but '[n]o evidence is admissible to show the [actual] effect of such statement, conduct, condition, or event upon a juror . . . or concerning the mental processes by which [the verdict] was determined." (*In re Hamilton* (1999) 20 Cal.4th 273, 294, italics omitted (*Hamilton*).)

"This rule 'serves a number of important policy goals: It excludes unreliable proof of jurors' thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by losing counsel eager to discover defects in the jurors' attentive and deliberative mental processes. It reduces the risk of postverdict jury tampering. Finally, it assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes.' " (*Hamilton*, *supra*, 20 Cal.4th at p. 294, fn. 17.)

Defendant admits that Juror No. 44's subjective beliefs were inadmissible under Evidence Code section 1150, but argues that the following three statements fall outside of Evidence Code section 1150's purview: (1) " 'jurors made an assumption of guilt based on the gang allegation' "; (2) " 'based on how the jurors spoke[,] . . . many jurors already had their mind[s] made up' ";

and (3) " 'jurors were using a "but for" standard instead of the reasonable doubt standard of guilt.' " (Italics omitted.) Defendant's argument is unpersuasive.

First, the statement that jurors assumed defendant was guilty based on the gang allegation falls squarely within the ambit of Evidence Code section 1150. In essence, Juror No. 44 asserted her belief that other jurors subjectively believed that the defendant was guilty because the crime allegedly was committed for purposes of defendant's gang. As our sister court has explained: "The subjective quality of one juror's reasoning is not purged by the fact that another juror heard and remembers the verbalization of that reasoning. To hold otherwise would destroy the rule . . . which clearly prohibits the upsetting of a jury verdict by assailing these subjective mental processes. It would also inhibit and restrict the free exchange of ideas during the jury's deliberations." (*People v. Elkins* (1981) 123 Cal.App.3d 632, 638.)

Second, Juror No. 44's statement that many jurors had made up their minds similarly reflects Juror No. 44's view of the other jurors' mental states during the deliberative process. Juror No. 44's view of other jurors' subjective mental states is inadmissible under Evidence Code section 1150. "The reality that a juror may hold an opinion at the outset of deliberations is . . . reflective of human nature. . . . We cannot reasonably expect a juror to enter deliberations as a *tabula rasa*, only allowed to form ideas as conversations continue. What we can, and do, require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination." (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 75.)

Juror No. 44's claim that the jurors did not follow the court's instruction was also inadmissible under Evidence Code section 1150. As *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108 (*Bell*) explained: Under Evidence Code section 1150, "juror declarations are inadmissible to the extent that they purport to describe the jurors' understanding of the instructions or how they arrived at their verdict." (*Bell*, at p. 1125.) Further absent "[a]n express agreement not to follow the instructions 'or extensive discussion evidencing an implied agreement to that effect' " a juror's understanding of how other jurors applied the trial court's instructions is inadmissible under Evidence Code section 1150.[5]

---

[5] "It is axiomatic that cases are not authority for propositions that are not considered." (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043.) Ignoring this well rooted principle, defendant relies on several cases that do not consider the application of Evidence Code section 1150 and therefore do not support his argument that Juror No. 44's affidavit was admissible under Evidence Code section 1150.

For example, in *People v. Weatherton* (2014) 59 Cal.4th 589 (*Weatherton*), the defendant argued that a juror's misconduct during the guilt phase of a trial required reversal. Specifically, the juror discussed punishment and judged the case prior to deliberations. (*Id.* at p. 593.) The trial court questioned jurors at a hearing and several jurors agreed that they had discussed the case prior to deliberations. (*Id.* at p. 597.) The high court accepted the defendant's argument that a juror "committed prejudicial misconduct, and reversal is required." (*Id.* at p. 598.) The high court did not apply Evidence Code section 1150 or consider whether evidence was admissible under that section. Neither party raised the issue of Evidence Code section 1150. (*Id.* at p. 595, fn. 5.) Therefore, defendant cannot rely on

(*Bell*, at pp. 1127–1128.) To recap, defendant identifies no admissible evidence of jury misconduct. Without showing admissible evidence of misconduct, defendant cannot show that the court erred in denying his motion for a new trial based on jury misconduct.[6]

Weatherton to argue that Juror No. 44's affidavit was admissible under Evidence Code section 1150.

For the same reasons *People v. Leonard* (2007) 40 Cal.4th 1370 (*Leonard*) does not assist defendant. In *Leonard*, the high court concluded that the jury committed misconduct "by violating the trial court's instruction not to discuss defendant's failure to testify." (*Id.* at p. 1425.) The high court considered whether the defendant was prejudiced by the juror misconduct. The high court did not consider whether evidence of misconduct was admissible under Evidence Code section 1150. *Leonard* therefore does not support the conclusion that in this case Juror No. 44's affidavit was admissible under Evidence Code section 1150.

A final example of a case defendant cites that is irrelevant to the Evidence Code section 1150 analysis is *People v. Lomax* (2010) 49 Cal.4th 530 (*Lomax*). In *Lomax*, our Supreme Court explained that " 'A sitting juror's actual bias, which would have supported a challenge for cause, renders him "unable to perform his duty" and thus subject to discharge and substitution . . . .' " (*Id.* at p. 589.) For example, a juror's view on capital punishment may disqualify him or her from a jury required to consider the death penalty. (*Ibid.*) The high court held that the trial court's discharge of a juror based on false statements in the jury questionnaire and refusal to deliberate were supported by the evidence. (*Id.* at p. 590.) The high court did not consider the applicability of Evidence Code section 1150. *Lomax* therefore does not assist defendant.

[6] Defendant also states that the trial court should have held an evidentiary hearing. Given the absence of any admissible

C. Defendant's Claim of Ineffective Assistance in not Uncovering Juror No. 18's Purported Concealed Bias Fails When the Record Demonstrates No Concealed Bias

Defendant argues his trial counsel was ineffective for failing to recognize that "Juror No. 18[ ] conceal[ed] . . . his gang experience when specifically asked during voir dire." (Bold and capitalization omitted.)

A trial court may consider evidence that a juror concealed bias during voir dire as evidence of juror misconduct. (*Hamilton*, *supra*, 20 Cal.4th at p. 294.) Defendant argues that his counsel rendered ineffective assistance of counsel by failing to recognize that Juror No. 18 concealed his "personal experience" with gangs "despite being asked." There is no support for defendant's statement that Juror No. 18 was asked about his personal experience with gangs. The premise of defendant's argument thus lacks foundation.

During voir dire, the trial court asked prospective jurors: "One of the allegations is that this offense was committed for the benefit of a street gang. There may be evidence that people affiliated with the case, whether Mr. Melara, witnesses, decedent in this case, may have affiliation with gangs. Do any of you know any gang members or are associated with any? Juror No. 18 did not answer the trial court's inquiry.

The trial court also asked: "[A]re any of you victims of any kind of gang-related crime whether theft or violence or anything

---

evidence, there was no basis for a hearing on jury misconduct. (*People v. Avila* (2006) 38 Cal.4th 491, 604 [posttrial evidentiary hearing on issue of jury misconduct necessary only if disputed issue of fact].)

of that nature?" "Have any of you ever seen any gang activity? You've seen things on the street or at work or somewhere that you thought was indicia of a gang?" "Are any of you familiar with a gang by the name of La Mirada Locos, LML?" "Are any of [you] familiar with the gang Rebels 13?" "Do any of you have any specific training or experience in the subject of street gangs or any psychology or any of the things of those types of subjects or the academic side of that?" "Will all of you be able to evaluate the evidence fairly and not simply disregard things because gang evidence is involved?" "Can you be fair to him? Or are you going to say, 'He's affiliated with a gang and I'm done with him.' " Juror No. 18 did not respond to these inquiries.

Defense counsel also asked prospective jurors about issues related to gangs. Defense counsel asked, "Do you think that if you're in a gang and/or in anyway associated with a gang that you should automatically be guilty because of association?" Defense counsel did not ask additional questions.

Juror No. 18 responded, "Guilty of what, I would say." Defense counsel responded, "Of anything. Of anything that another gang member does." Juror No. 18 responded, "Not just because of association. But if you're related to it or you know about it, you could have stopped it." Defense counsel did not ask any additional questions.

For the first time on appeal, defendant argues that Juror No. 18 failed to disclose during voir dire that he had "personal experience" with gangs. Defendant argues that his counsel rendered ineffective assistance in failing to discover the purported discrepancy between Juror No. 18 statements during voir dire and Juror No. 44 description of Juror No. 18 as having "personal experiences" with gangs. In her posttrial affidavit,

Juror No. 44 reported that Juror No. 18 "discussed his personal experiences with gangs." Juror No. 44 provided no further elaboration as to the nature of Juror No. 18's alleged "personal experiences."

The principal problem with defendant's argument is that he identifies no question posed during voir dire that mandated Juror No 18 to reveal his purported "personal experience" with gangs. Juror No. 44 did not aver that Juror No. 18 knew gang members, was associated with gang members, was the victim of a gang violence, or observed gang activity or other indicia of a gang. Juror No. 44's vague statement that Juror No. 18 had "personal experience" is not directly responsive to any question posed during voir dire.

In sum, the record does not support defendant's argument that Juror No. 18 concealed a bias during voir dire. Defendant's argument that his trial counsel was ineffective is premised on just such a showing. As the Attorney General argues, "There was no claim to raise, so defense counsel could not be ineffective for failing to raise it."

D. Defendant's Claim that His Trial Counsel Rendered Ineffective Assistance In Failing to Provide a Mitigation Report to the Trial Court Before Sentencing Lacks Merit

Defendant's trial counsel provided a mitigation report attached to a brief for defendant's "youth offender parole hearing." The record does not show exactly when the trial court received the report. On appeal, defendant argues his counsel rendered ineffective assistance in failing to present the report before the trial court exercised its sentencing discretion. For purposes of this appeal, we assume that the trial court did not

receive the report before it sentenced defendant. We first provide additional background and then explain why defendant's argument lacks merit.

1. Background

Defendant's counsel filed a sentencing memorandum. In it she argued defendant had a minimal criminal record. Defendant had learning disabilities and was only 22 years old when he committed the crime. Counsel recounted: Defendant "was born to a teenage mother, who did not have much [*sic*] resources to raise him." "Mr. Melara's biological father was abusive towards his mother and was an absent parent for most of his life." "Mr. Melara's childhood was unstable as he lived with his mother, his grandmother, and moved frequently."

Defense counsel also filed a brief and an exhibit relevant to defendant's "youth offender parole hearing." The exhibit was entitled "Final Mitigation Report" and was prepared by Jessica Pfeifer, a "Mitigation Specialist." The report details how defendant's grandmother entered the United States from Mexico, defendant's father's abuse of defendant's mother, and defendant's grandmother's undertaking of caretaking responsibilities for defendant. Defendant moved frequently. Defendant did not complete high school, having left his senior year. Defendant reported no mental health symptoms, but he sometimes disappeared from his home. Defendant reported witnessing violent incidents, including the shooting of one of his cousins. Defendant reported that he used alcohol and marijuana. Defendant worked at several part-time jobs.

Pfiefer identified the following mitigating circumstances: (1) "The defendant's mother was a teenager and overwhelmed parent"; (2) "[t]he defendant's father was an absent parent"; (3) "[t]he defendant's childhood was marked by instability"; (4) [t]he defendant has significant cognitive issues and was identified as learning disabled." (Italics and underlining omitted.) Facts supporting each factor were described in the mitigation report.

At sentencing, the trial court stated, "The court has read and considered the probation report and has also read and considered the sentence memorandum filed by the People on July 11th as well as [the] sentencing memorandum filed by the defense on March 19th." Later, the court indicated it considered a letter on behalf of defendant by Hugo Brent. That letter is not in the appellate record.

At the sentencing hearing, defendant's counsel argued that there were mitigating factors. She emphasized defendant's age at the time of the crime, his lack of an extensive criminal history, his courteous conduct, and the fact that his mother was young at the time defendant was born. Counsel argued that defendant's mother "was a teenage mother when Mr. Melara was born. She, herself, did not have to raise him. She had to finish her schooling and also work. So he spent time with his mother and grandmother. He witnessed physical abuse from his biological father toward his mother and then his father became an[ ] absent figure for most of his life. His family always struggled financially and they moved around a lot living with either his mother or his grandmother or other family members."

Counsel also pointed out that defendant suffered from "learning disabilities." Counsel emphasized that defendant

was not the shooter. Based on all of these factors, counsel requested that the court strike the gun enhancement.

Prior to imposing its sentence, the trial court identified factors in mitigation and aggravation. The court noted that defendant had an insignificant criminal history. "With regard to exercise of discretion [in imposing or striking the section 12022.53 enhancement], the court does not feel this would be the appropriate case for striking the gang enhancement given the brazenness and callousness of the offense. As the People indicate, this happened in broad daylight and luckily no other people were injured . . . ." The court denied defendant's request to strike the firearm enhancement.

After imposing sentence and referring the matter to the probation department, the trial court noted that defendant had submitted a brief and the above described mitigation report.

2. Analysis

To demonstrate ineffective assistance of counsel, a defendant must demonstrate deficient conduct and prejudice. (*People v. Williams* (1997) 16 Cal.4th 153, 214–215 (*Williams*).) In considering a claim of ineffective assistance of counsel, it is not necessary to determine " 'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' " (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 697.) To demonstrate prejudice, defendant must show a "reasonable probability" that the errors affected the result. (*Williams*,

at p. 215.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid.*)

We assume for purposes of appeal that defense counsel failed to timely provide the mitigation report to the court. Defendant, however, has failed to demonstrate prejudice from this purported failure. Defense counsel informed the trial court of the key elements of that report in the sentencing memorandum and during oral argument prior to the court's exercise of its sentencing discretion. Thus, the trial court exercised its discretion to impose the enhancement with knowledge of the potential mitigation factors. Although the report contained additional factual details, it is not reasonably probable that the court's review of the entire report would have resulted in a more favorable result to defendant.

E. The Trial Court Did Not Err in Imposing a Section 12022.53 Enhancement

Defendant argues that remand is necessary because the trial court misunderstood the scope of its discretion to impose or strike the section 12022.53 enhancement. Specifically, defendant contends the trial court had discretion to impose a lesser uncharged enhancement if it was not willing to strike the enhancement altogether.

Effective January 1, 2019, section 12022.53, subdivision (h) provides in pertinent part: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§ 12022.53, subd. (h).) Section 1385 in turn permits a court to strike or dismiss an enhancement in the furtherance of justice. (§ 1385, subd. (b)(1).)

The trial court recognized that the new statute afforded it discretion to strike the section 12022.53 enhancement. It invited

counsel to submit argument on the issue. At the sentencing hearing, counsel argued whether the court should impose or strike the firearm enhancement. No counsel argued that the court could instead impose an uncharged lesser enhancement.

There is a split of authority on whether in exercising its discretion to impose or strike a section 12022.53 enhancement, the trial court may instead impose an uncharged enhancement. In *Morrison*, *supra*, the appellate court held that a trial court may impose an uncharged enhancement under section 12022.53, subdivisions (b) or (c) if it strikes the enhancement under section 12022.53, subdivision (d). "[T]he court could impose an uncharged enhancement under section 12022.53, subdivision (b) or (c) in lieu of an enhancement under section 12022.53, subdivision (d) if it was unsupported by substantial evidence or was defective or legally inapplicable in some other respect. We see no reason a court could not also impose one of these enhancements after striking an enhancement under section 12022.53, subdivision (d), under section 1385." (*Morrison*, *supra*, 34 Cal.App.5th at pp. 222–223.)

In contrast, *Tirado*, *supra*, held that the trial court could not impose an uncharged lesser enhancement. "Nothing in the plain language of sections 1385 and 12022.53, subdivision (h) authorizes a trial court to substitute one enhancement for another. Section 12022.53, subdivision (h) uses the verbs 'strike' and 'dismiss,' and section 1385, subdivision (a) states the court may 'order an action to be dismissed.' This language indicates the court's power pursuant to these sections is binary: The court can choose to dismiss a charge or enhancement in the interest of justice, or it can choose to take no action. There is nothing in either statute that conveys the power to change, modify, or

substitute a charge or enhancement." (*Tirado*, *supra*, 38 Cal.App.5th at p. 643.)

The *Tirado* court further reasoned that in exercising its " 'executive functions,' " the prosecutor, and not the court, determines what charges to bring. "[B]ecause the People exercised their charging discretion to allege only one enhancement, the trial court was limited to either imposing or striking that enhancement." (*Tirado*, *supra*, 38 Cal.App.5th at p. 644.)

We conclude that *Tirado* is better reasoned. Accordingly, there is no basis for remanding the matter to the trial court to exercise a discretion it does not have.[7]

F. Defendant Demonstrates No Error In Assessing Fines and Fees Without an Ability to Pay Hearing

Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant argues the trial court erred in imposing the $30 court facilities assessment, $40 court operations assessment and $300 restitution fine because the trial court did not hold an ability to pay hearing. Defendant does not challenge the victim restitution, but contends that the amount of restitution should be considered in determining whether defendant has the ability to pay the restitution fine and assessments.

---

[7] In his reply brief, defendant argues that *People v. Marsh* (1984) 36 Cal.3d 134 (*Marsh*) requires a different result. *Marsh* explained that under section 1385, in the context of a plea, a trial court could strike allegations and reduce a sentence to allow a minor eligibility into Youth Authority. (*Id*. at p. 143.) Our high court in *Marsh*, however, did not consider the language of section 12022.53, subdivision (h), and therefore *Marsh* is not controlling here.

In *Dueñas*, an unemployed, homeless mother with cerebral palsy lost her driver's license when she was unable to pay over $1,000 assessed against her for three juvenile citations. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160–1161.) Thereafter she received multiple convictions related to driving with a suspended license, each accompanied by jail time and additional fees she could not afford to pay. (*Id*. at p. 1161.) The trial court rejected Dueñas's request to hold an ability to pay hearing despite undisputed evidence that she was indigent. (*Id*. at p. 1163.)

The appellate court reversed, holding that due process prohibited imposing the same assessments imposed in the current case and required the trial court to stay execution of the restitution fines until the trial court held an ability to pay hearing. (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) The court expressed concern for "the cascading consequences of imposing fines and assessments that a defendant cannot pay," noting that Dueñas's case " 'doesn't stem from one case for which she's not capable of paying the fines and fees,' but from a series of criminal proceedings driven by, and contributing to, Dueñas's poverty." (*Id*. at pp. 1163–1164.) The court referenced "the counterproductive nature of this system and its tendency to enmesh indigent defendants in a cycle of repeated violations and escalating debt." (*Id*. at p. 1164, fn. 1.)

Dueñas is distinguishable because defendant here does not face incarceration because of his inability to pay fines and fees. He is incarcerated because he aided and abetted the killing of a rival gang member. (*Caceres*, *supra*, 39 Cal.App.5th at p. 928 [declining to apply *Dueñas*'s "broad holding" beyond its "unique facts"].) Also, in contrast to the defendant in *Dueñas* who was unemployed and disabled, the record shows that defendant here

held multiple part-time jobs. Moreover, following *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted Nov. 26, 2019, S258946, this court has held that *Dueñas* was wrongly decided because it misapplied due process precedents. (*People v. Kingston* (2019) 41 Cal.App.5th 272.) Even if, arguendo *Dueñas* were correctly decided, imposition of the minimal assessments here (totaling $370) was harmless given defendant's ability to earn wages during his four-decade prison sentence. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139–140 [any error under *Dueñas* harmless when defendant "will have the ability to earn prison wages over a sustained period"].)

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.